No. 82-1651

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CRISPUS NIX, Warden of the
Iowa State Penitentiary,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

RESPONDENT'S SECOND SUPPLEMENTAL BRIEF

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The respondent submits this supplemental brief pursuant to Rule 35.5 of the Rules of this Court, in order to address intervening matters that were not available in time to have been included in his brief in chief. These intervening matters

consist of new legal and factual issues which were raised for the first time in the Petitioner's Reply Brief, and which the respondent cannot adequately address in the time allotted for oral argument.

I. UNITED STATES V. WADE DOES NOT SUPPORT THE USE OF A DETERRENCE/ BALANCING APPROACH IN THIS CASE.

The State's Reply Brief for the first time argues that United States v. Wade, 388 U.S. 218 (1967), supports the use of a balancing/deterrence approach to this case. (Reply Br. at 4-5). This argument is without merit because Wade is a prophylactic rule case, while this case is not.

In Wade, this Court held that when a witness identifies a defendant at a post-initiation lineup without notice to and in the absence of counsel, the government may use that witness's in-court identification of the defendant only if it shows, by clear and convincing evidence, that the in-court identification had a source

independent of the lineup identification. As the petitioner indicates, this Court's analysis in Wade did refer to the deterrence of future police misconduct and to the "attenuation" doctrine articulated in Wong Sun v. United States, 371 U.S. 471, 488 (1963). However, the Sixth Amendment problem addressed in Wade was fundamentally different from the Sixth Amendment problem involved in this case, and consequently Wade's deterrence analysis and holding have no application here.

In Wade, the counsel-less lineup identification was not necessarily the cause of the in-court identification; rather, the in-court identification might well have been the product of the witness's observations during the crime in question. However, because of the inherent possibility that a counsel-less lineup identification might be the cause of an in-court identification, Wade set up

a prophylactic presumption against the admission of the in-court identification in order to deter lineups without counsel -- but still allowed the government to show that the in-court identification was in fact the product of other, legitimate sources. 388 U.S. at 228-241. In short, just as Miranda v. Arizona, 384 U.S. 436 (1966), is a Fifth Amendment prophylactic rule case, Wade is a Sixth Amendment prophylactic rule case. See Halpern, Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell, 82 Colum. L. Rev. 1, 38 (1982). Of course, a deterrence/balancing approach is appropriate in such prophylactic rule situations. (See Resp. Br. at 9, n.5).

However, this case is not a prophylactic rule case. While in Wade there was substantial doubt as to whether the counsel-less lineup caused the in-court identification, there is no question in

this case that the evidence at issue in fact was the direct product of Detective Leaming's violation of the respondent's Sixth Amendment rights. Given that fact, a Wade-type prophylactic rule and its underlying deterrence analysis are not applicable here. In short, this case is like Massiah v. United States, 377 U.S. 201 (1964), United States v. Henry, 447 U.S. 264 (1980), Estelle v. Smith, 451 U.S. 454 (1982), and Brewer v. Williams, 430 U.S. 387 (1977) -- none of which involved a prophylactic rule or a deterrence/balancing approach -- and not like United States v. Wade, supra.[1]

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[1] The petitioner's Reply Brief (pp. 4-5) may be read as implying that the respondent cited Wade as support for his Sixth Amendment analysis. However, this is not the case: The respondent cited Wade only in a footnote dealing briefly with the issue of what burden of proof should be applied if a hypothetical-probable-discovery doctrine was (incorrectly) adopted in the first place. (Rep. Br. at 31, n.26).

II. THE RECORD DOES NOT SUPPORT THE PETITIONER'S REPLY BRIEF'S ASSERTIONS WITH REGARD TO AGENT RUXLOW'S TESTIMONY ABOUT PHOTOGRAPHIC EXHIBIT D.

In connection with the issue (which this Court should not reach under a proper Sixth Amendment analysis) of whether the body would have been found if Leaming had not violated the respondent's Sixth Amendment rights, the petitioner's Reply Brief raises the argument that Agent Ruxlow did not testify falsely that State Court Exhibit D (Habeas Ex. 5; App. 108) showed the body as it was found, because he actually was referring to State Court Exhibit C (Habeas Ex. 3; App. 107). This argument is supported by one sentence quoted out of context from the record, with a reference to Exhibit C added in brackets. (Reply Br. at 7). But if one considers all of Ruxlow's testimony about Exhibits C and D, the petitioner's interpretation of the record is not reasonably

supportable:

> Q: I would like to hand you what has been marked State Exhibit C and ask you what that depicts, if you know?
>
> A: That depicts the position of which the body . . . was discovered on the culvert . . . .
>
> Q: To the best of your recollection, at the time that this picture . . . would have been taken, had any snow been brushed away from the face of the child?
>
> A: No.
>
> * * *
>
> Q: I hand you what has been marked State's Exhibit D and ask you if you can tell me what that depicts, if you know?
>
> A: That's the same culvert as in State's Exhibit C. This is taken a little further away, and it shows the . . . body . . . .
>
> Q: Has any snow been removed or trampled down as indicated in State's Exhibit D?
>
> A: No. That's exactly the way it was found.

(App. 38-39). The State's argument asks this Court to believe that the prosecution handed Ruxlow Exhibit C; asked him about

the removal of snow in that photograph; then handed Ruxlow Exhibit D; and then asked again about the removal of snow in Exhibit C. This simply is not sensible; and both the state trial court (which actually saw Ruxlow testify) and the Iowa Supreme Court plainly interpreted Ruxlow's second statement about the removal of snow as referring to the Exhibit he had just been handed -- Exhibit D. (App. 86; Pet. at A48, 285 N.W.2d at 262).

III. THE RECORD DOES NOT SUPPORT THE PETITIONER'S NEW ARGUMENT CONCERNING THE AGREEMENT NOT TO INTERROGATE.

Only one point in the Petitioner's Reply Brief regarding the "good faith" issue raises new matter that requires any response. The petitioner now argues for the first time that there is no indication that Leaming himself was a party to the agreement not to question the respondent before he reached his attorney in Des

Moines. (Reply Br. at 11-12). However, contrary to the petitioner's assertion, this Court's opinion in Brewer v. Williams, 430 U.S. 387 (1977), did regard the agreement as having been made with Leaming. For example, this Court stated that "it was agreed between McKnight and the Des Moines police officials" that Leaming and a fellow officer would not question the respondent -- obviously referring to the Des Moines police officials mentioned in the immediately preceding sentences, who included Leaming. 430 U.S. at 391 (emphasis added). Moreover, the evidence in the record in Brewer indicated that Leaming knew of the agreement. (See Brewer App. 37-39, 64). Perhaps most tellingly, the state trial court expressed explicit doubts about Leaming's candor with regard to the agreement (Brewer App. 2); there would have been no reason for the trial court to do so if it had not

concluded that Leaming knew of the agreement.

CONCLUSION

The Petitioner's Reply Brief contains a number of factual assertions and legal arguments, besides those discussed above, that are without merit. However, since these points either do not raise new matter or do not require any response, this brief will not address them.

Respectfully submitted,

ROBERT BARTELS
Counsel for the Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of January, 1984, he deposited three copies of the foregoing document in a United States Post Office mailbox, with postage prepaid, and addressed to counsel for the petitioner:

Mr. Brent R. Appel
Deputy Attorney General
Hoover Office Building
Des Moines, Iowa 50319

The undersigned further certifies that all parties required to be served have been served.

ROBERT BARTELS